APR 8 1940

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 930

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
A Corporation,
Petitioner,

v.

HELEN RICHARDSON,
Respondent.

PETITION [illegible]
To the United States [illegible]
[illegible]

BRIEF IN SUPPORT [illegible]

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v.

ELMER RICHARDSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit.

The Chesapeake and Ohio Railway Company, a corporation of the State of Virginia, petitions this Court to issue its writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered on January 10, 1941, in cause No. 8388 in said court, wherein this petitioner was appellant and the respondent was appellee.

SUMMARY STATEMENT OF MATTER INVOLVED.

This action was brought by Elmer Richardson in the United States District Court for the Northern District of Ohio, Eastern Division, under authority of the Federal Employers' Liability Act (U. S. Code, Title 45, Secs. 51-59) against The Chesapeake and Ohio Railway Company, to recover damages for personal injury consisting of the loss of an eye. The case was tried to a jury, which returned a verdict of $6,000.00 for the plaintiff, on which verdict the trial court rendered judgment. The judgment was affirmed by the Circuit Court of Appeals for the Sixth Circuit.

Richardson's amended petition (R. 2-4), on which the case was tried, sets forth that on April 6, 1937, he was required in the course of his employment to aid in the operation of cutting a steel rail with a chisel, during which operation a large sliver of steel was thrown off from the rail and struck him in the right eye, injuring the eye so badly that it had to be removed. The petition alleged negligence by the company in numerous respects, all of which were eliminated by the court from consideration by the jury except that of "failing to hold up the cutting operation until he" (Richardson) "had had a reasonable opportunity of getting into the clear so as to avoid the risk of injury from flying chips." (R. 48, 49, 55.) The company's answer (R. 5) admitted plaintiff's employment and injury and denied that it was negligent and that its negligence caused the injury. It further pleaded assumption by plaintiff of the risk of the injury complained of.

The following facts relative to the accident appear in evidence, without dispute except as otherwise indicated:

At the time of the accident, Richardson had been in the employ of the company about nine years, in an "extra gang" working on the track at various places. (R. 18.) He had on previous occasions worked at cutting rails (R. 21), he knew that chips frequently flew from the rails during that process, and had commented on the unusually large number of chips coming off the rails on which the crew had been working for a day or two before the accident. (R. 29.) On the day of the accident he was working with three other men who were cutting a rail with sledges and a chisel. The rail was lying on the ground in the "devil strip" between two tracks, with one end supported by an angle bar which raised it some three inches from the ground. One of the men held a chisel upon the rail at the point where it was to be cut, directly above the angle bar, while the other two struck the head of the chisel alternately with 10-pound sledges. Richardson's duty was to turn the rail so that the

upper part, or ball would be exposed, and to adjust it "workwise" on the angle bar. (R. 18.)

The company required the three men immediately engaged in the cutting operation to wear goggles, and furnished the goggles. (R. 36.) Goggles were not furnished to men doing the kind of work Richardson was doing. (R. 28.) Instructions were issued for men not immediately engaged to "move themselves from the scene" or "turn their backs to the operation," as testified by the division engineer. (R. 36.) Richardson (R. 20) testified that the foreman had instructed him to get back in the clear, and the foreman (R. 45) and two members of the cutting crew (R. 30, 45, 46) testified that the foreman had instructed the crew not to start cutting until Richardson was in the clear. All of these witnesses gave estimates as to the distance at which one would be safe from flying chips, but only the division engineer testified (R. 36, 37)—and apparently he was the only witness asked,—about the standing instructions to turn the back as a means of protection.

Richardson, having adjusted the rail, was walking away with his back to the operation, and had walked about 18 to 20 feet when he heard the men with the sledges begin to strike. (R. 18, 19.) After he had heard them strike "three or four times—something like two or three, I don't know" (R. 23) he turned around, and as he turned he was struck in the right eye by a flying chip of steel. (R. 19.)

The evidence was in conflict as to Richardson's purpose in turning. He had, shortly after the accident, stated (R. 35) that he turned to see whether the rail had slid and his attention was needed again. He testified on direct examination that he "started to turn around to see what they were doing." (R. 19.) He also testified that he intended to "tell them to wait till I got farther away," but did not actually tell them anything. (R. 19.) Whatever his purpose may have been, it is clear from the record that he must have turned deliberately, after hearing from two to four sledge-hammer blows which, as he said, were not

struck rapidly (R. 23), and after figuring that the blows were struck by the crew he had been helping. (R. 23.) There was no testimony that he turned involuntarily or as a result of being startled, or under the stimulus of sudden peril. On the contrary, Richardson's own uncontradicted testimony excludes such a possibility.

The defendant moved, at the close of the plaintiff's evidence (R. 30) and again at the close of all the evidence (R. 46), for a directed verdict in its favor, on the ground that the plaintiff knew of and assumed the risk of the injury he suffered; which motions the court overruled.

Before argument, the defendant requested the court to include in his charge to the jury the following instruction (R. 46):

> "If you find from the evidence that Richardson was an experienced employee in the kind of work in which he was engaged at the time of the accident; that he had himself participated in the operation of cutting a rail with chisel struck by a hammer, and knew that chips were likely to fly during the said operation; and that there was danger of injury to the eye if it were exposed to such flying chips; then I say that if he turned his face towards the work, knowing that the operation of striking the chisel was going on and likely to be continued, he assumed the risk of the injury which was likely to occur and did occur, and that your verdict should be for the defendant."

The court did not include this instruction in its charge either literally or in substance. On the contrary, the court's instruction on the subject of assumption of risk included the following passage (R. 51):

> "But if, after the distance of 18 to 20 feet, Richardson turned around, knowing that the cutting operation had commenced, *and believing himself in the clear,* he must be held to have assumed the risk." (Italics ours.)

The court also, in its charge on the subject of negligence, made distance the criterion of danger, saying in part (R. 52):

> "*Just what distance away* was considered 'in the clear,' that is, a *sufficient distance* away to escape the risk and hazard of flying chips and slivers, is not definitely fixed in the evidence. Richardson testified that 30 to 35 feet was his notion of *a reasonably safe distance.* If it was the instruction and understanding that Richardson was to be given an opportunity of *getting in the clear,* and the cutters failed to give him such opportunity to get *to a reasonably safe distance* before cutting, it seems to me it was negligence, and if directly because of it Richardson was injured, he is entitled to recover." (Italics ours.)

It was clear from the record that there was no substantial danger from flying chips except to the eyes. Richardson testified he had never known of a man being hurt by chips hitting him any place. (R. 21, 22.) The division engineer said that chips sometimes inflicted minor injuries in other portions of the body, but that such injuries occurred very seldom. (R. 38.) Obviously turning one's back protected his eyes at least as completely as moving 40 feet away, and the division engineer testified that the men were instructed either to move away or turn their backs (R. 36) but the court by its charge required the jury to find negligence if Richardson was deprived of the opportunity to get a certain distance away. When we requested the court to correct this error, the court said (R. 56, 57):

> "The Court: I said to the jury that what under all the facts of the case would be 'in the clear' depends upon what you believe from the evidence was a reasonable distance and position to afford safety.
>
> Mr. Wickham: Did you say 'position'?
>
> The Court: Yes—to afford safety to a man doing Richardson's work and exercising due precaution. If you think that does not dispose of it you had better take an exception."

During his closing argument, counsel for plaintiff said (referring to the three men in the cutting crew whom Richardson was helping) (R. 47):

> "There were three men who were right there and knew what happened, and they are their employees. Don't you suppose that if they would contribute a single word that would help them out on that, they would be here testifying?"

Counsel for defendant objected to this argument, and in the colloquy which followed, he asserted (and plaintiff's counsel admitted), that the depositions of these men had been taken by the plaintiff and were in the files; and plaintiff's counsel stated that the men themselves were within the range of the process of the court. (R. 47.) The men were as fully available to plaintiff as to defendant, and so was their testimony.

BASIS OF THIS COURT'S JURISDICTION.

The statutory provision believed to sustain the jurisdiction of this Court to review the judgment of the Circuit Court of Appeals is Section 240 (a) of the Judicial Code (U. S. Code, Title 28, Sec. 347 (a)).

The judgment of the Circuit Court of Appeals was entered January 10, 1941. The petitioner on January 27, 1941, filed its petition for rehearing in said court, which rehearing was denied by order entered February 11, 1941.

QUESTIONS PRESENTED.

The following questions are presented on the record in this cause:

(1) Was Richardson's own act, in turning to face the cutting operation, the sole proximate cause of his injury?

(2) Did Richardson assume the risk of injury from flying chips?

(3) Was the trial court's charge erroneous in its definition of negligence or on the subject of assumption of risk?

(4) Was plaintiff's counsel guilty of misconduct preventing defendant from having a fair trial?

REASONS RELIED ON FOR ALLOWANCE OF THIS WRIT.

(1) The decision of the Circuit Court of Appeals, in holding that Richardson's turning around to face the cutting operation was not the sole proximate cause of his injury, conflicts with the decision of this Court in the case of

Great Northern Ry. Co. v. Wiles, 240 U. S. 444, 36 S. Ct. 406, 60 L. Ed. 732 (1916),

and with the decision of the Circuit Court of Appeals for the Second Circuit in the case of

Vanderveer v. D. L. & W. R. R. Co., 84 F. (2) 979 (1936)

and departs from the law as declared by the Sixth Circuit Court itself in the case of

Hylton v. Southern Ry. Co., 87 F. (2) 393 (1937).

(2) The Circuit Court of Appeals defined the assumption of risk and applied its definition to the undisputed facts of this case, in a manner which is erroneous and in conflict with the applicable decisions of this Court in cases arising under the Federal Employers' Liability Act,—particularly the cases of:

C. & O. Ry. Co. v. Kuhn, 284 U. S. 44, 52 S. Ct. 45, 76 L. Ed. 157 (1931);

S. A. L. Ry. v. Horton, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062 (1914); and

C. & O. Ry. Co. v. Nixon, 271 U. S. 218, 46 S. Ct. 495, 70 L. Ed. 914 (1926).

BEN B. WICKHAM,

Attorney for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals is reported at 116 Fed. (2d) 860. It is also included in the printed record filed herewith. (R. 67-72.)

The District Judge filed a memorandum with his orders overruling the motion for new trial and the motion for judgment notwithstanding the verdict. (R. 11, 12.) This memorandum is not reported.

No other opinions were rendered by either court.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

These grounds have been set forth in the petition (*supra*, p. 6) and in the interest of brevity are not repeated here.

STATEMENT OF THE CASE.

The case has been stated in the petition (*supra*, pp. 1-6) as fully as neeessary for this brief, and in the interest of brevity the statement is not repeated.

ERRORS INTENDED TO BE URGED.

(1) The Circuit Court of Appeals erred in holding that Richardson's own act, in turning to face the cutting operation, was not the sole proximate cause of his injury.

(2) The Circuit Court of Appeals erred in holding that Richardson did not assume the risk of the injury which he suffered.

(3) The Circuit Court of Appeals erred in holding that the trial court's charge was not erroneous.

(4) The Circuit Court of Appeals erred in holding that plaintiff's counsel was not guilty of misconduct preventing defendant from having a fair trial.

ARGUMENT.

I.

RICHARDSON'S OWN ACT, IN TURNING TO FACE THE CUTTING OPERATION, WAS THE SOLE PROXIMATE CAUSE OF HIS INJURY.

A. The Evidence Shows no Negligence on the Part of the Railway.

The sole ground of negligence submitted to the jury was "in failing to hold up the cutting operation until he had had a reasonable opportunity of getting into the clear so as to avoid the risk of injury from flying chips." (R. 48, 49.) Richardson's own undisputed testimony was that at the time the cutting operation started, he was walking away from its scene, and had gone about 18 or 20 feet. (R. 18, 19.) If there was any negligence, it must have been in the cutting crew's starting to work at a time when Richardson was 18 to 20 feet away, with his back turned.

The evidence supports no other conclusion than that the only substantial danger from flying chips was that of injury to the eyes. The men immediately engaged in cutting were furnished goggles and required to wear them, but they wore no protection for other parts of the body

than the eyes, and no special clothing (R. 38, 39), although they had to work within the length of a sledge-handle of the source of the chips. Richardson himself, in his nine years of employment on a track gang, including participation in the work of cutting rails, had never known of anyone being injured by flying chips. (R. 21, 22.) His division engineer testified that minor injuries did occur, but very seldom. (R. 39.) His foreman testified that the chips flew "like pellets out of a gun," but he actually saw the chip as it hit Richardson. (R. 15.)

The cutting crew had been instructed,—on the evidence most favorable to plaintiff,—not to begin cutting until the other men "got in the clear." (R. 44, 45.) It was the alleged violation of this instruction on which the plaintiff relied, and which the trial court submitted to the jury, as the sole item of negligence. We submit that Richardson obviously was "in the clear" when the cutting started. With his back turned, his eyes were in no possible danger, and no injury to any other part of his body was, or could reasonably have been, anticipated. One of the cutting crew saw him just as the cutting started, 18 or 20 feet away and with his back turned, and considered that he was in the clear (R. 29, 30); and no other reasonable conclusion can be drawn from his distance and position.

B. Richardson's Turning to Face the Cutting Operation was such Negligence as to Defeat Recovery under the Rule of Great Northern Railway v. Wiles, 240 U. S. 444.

Under the provisions of the Federal Employers' Liability Act (U. S. Code, Title 45, Sec. 53) contributory negligence of the injured employee is not a bar to recovery, but operates to diminish the amount of damages recoverable in proportion to the amount of negligence attributable to the employee. However, this Court and several of the Circuit Courts of Appeals, including the Sixth, have held that where the employee's conduct is without extenuation

or amounts to violation of a rule or a specific instruction, it defeats recovery under the Act. An early decision of this Court exemplifying this rule is that in the case of

Great Northern Ry. Co. v. Wiles, 244 U. S. 444, 36 S. Ct. 406, 60 L. Ed. 732 (1916)

in which the brakeman of a freight train was killed while in the caboose after the train had been stopped by the pulling out of a draw bar. A rule of the railroad made it his duty to go back and warn following trains in case of such a stop. The decedent failed to do so and a following passenger train collided with the rear end of the freight. This Court reversed a judgment rendered in favor of Wiles' Administrator.

The Circuit Court of Appeals of the Second Circuit applied the same rule in the case of

Vanderveer v. D. L. & W. R. R. Co., 84 F. (2) 979 (1936)

in which a freight conductor was killed in a wreck resulting from his having, in violation of rule, changed certain switches which were lined up for the movement of another train. The Circuit Court of Appeals affirmed a judgment which the trial court had entered on a directed verdict in favor of the railroad.

The Circuit Court of Appeals for the Sixth Circuit formerly recognized the rule, as shown in the case of

Hylton v. Southern Ry. Co., 87 F. (2) 393 (1937)

in which are cited numerous decisions from the Sixth and other circuits, resting on the doctrine that

> "an employee may not recover under the Federal Employers' Liability Act (45 U. S. C. A. §§ 51-59) if he disobeys 'specific orders or standing rules promulgated for his own safety * * *. In such circumstances the employee's disobedience is regarded as primary negligence * * * as 'the sole proximate cause of the injury.' " (87 F. (2) p. 395.)

Richardson's conduct, as disclosed by the undisputed evidence, comes fully within the rule of these cases. Not only had the crew been instructed to give him the opportunity to get into the clear, but Richardson himself had been instructed to do so. His turning was plainly a violation of his instructions.

It does not alter the situation to argue that Richardson would probably have been safe in facing the cutting operation at a distance of 30 to 40 feet, but was not given time to reach that distance. He was perfectly safe in the position he had already reached, safe not only from the injury he subsequently suffered, but also from any other injury reasonably to be expected.

The Circuit Court of Appeals excused Richardson's turning on the theory that it was an act "done under the stimulus of sudden peril or in the case of an emergency requiring immediate decision." (R. 70.) The difficulty with this theory is that it has no basis in the record. If Richardson had in fact turned suddenly or without reflection, there would be room to claim, at least, that he did so as a reaction to a suddenly discovered danger. But his own testimony is that he heard several blows of the sledges, and figured it was the crew he had been helping, before he turned. (R. 23.) As to the "stimulus of sudden peril," the sound of a cutting operation which Richardson, in his nine years of employment, had never known to injure anybody, could hardly be very stimulating as a sudden peril or any other kind of peril, to a man with his back turned.

II.

RICHARDSON ASSUMED THE RISK OF THE INJURY HE SUSTAINED.

The Circuit Court of Appeals, undertaking to distinguish between assumption of risk and contributory negligence, said (R. 68):

> "Assumed risk refers to a general course of action in connection with the employer's way of doing busi-

> ness or the use of appliances furnished by him. Contributory negligence refers to the question as to whether the employee acted prudently in connection with matters that arose for his consideration during the course of his employment and under circumstances not contemplated by him as part of the employment. Assumption of risk rests upon the intelligent acquiescence and knowledge of the danger and appreciation of the risk naturally incident to the employment of or arising from a particular situation in which the work is done."

We submit that under the decisions of this Court, assumption of risk is not confined to general courses of action in connection with methods of doing business or using appliances, but extends also to the risk of single instances of negligence by the employee's fellow servants. We submit further that assumption of risk rests not only on intelligent acquiescence and knowledge of danger and appreciation of the risk, but that it may also be based on the existence of risks so obvious that an ordinarily prudent person would have observed them.

The Circuit Court of Appeals' definition of assumption of risk, which is fairly summarized in the passage above quoted, is directly in conflict in these two respects, with numerous decisions of this Court, and had the lower court applied the proper definition to the present record, it would have had to find, as a matter of law, that Richardson assumed the risk of the injury he sustained.

With respect to the scope of risks assumed, this Court in the case of

> *Seaboard Air Line Railway v. Horton*, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062 (1914)

noted the existence of two sorts of risks, one necessarily arising from the nature of the employment, and the other, overlooked by the Circuit Court of Appeals in the present case—the risks arising from negligence attributable to the employer. In the *S. A. L. v. Horton* case this Court held

that an engineer assumed the risk of operating a locomotive turned over to him without a guard for the water gauge, and reversed a judgment recovered by Horton in the trial court. Mr. Justice Pitney said (233 U. S., at p. 504):

> "Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employe is not treated as assuming until he becomes aware of the defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them."

In other cases this Court has observed that the assumed risk of negligence extends to the negligence of fellow-servants.

Thus, in the case of

C. & O. Ry. Co. v. Nixon, 271 U. S. 218, 46 S. Ct. 495, 70 L. Ed. 914 (1926)

this Court denied recovery for the death of a section foreman whose duty was to inspect the track, and who was killed while riding to his work on a railway velocipede which he used in track inspections. The jury found that the engineer and fireman of the train which killed the foreman were negligent in not being on the lookout. Mr. Justice Holmes said, in the opinion of the Court (271 U. S. at p. 219):

> "If the accident had happened an hour later when the deceased was inspecting the track, we think that there is no doubt that he would be held to have assumed

> the risk, and to have understood, as he instructed his men, that he must rely upon his own watchfulness and keep out of the way. The Railroad Company was entitled to expect that self-protection from its employees."

It seems to us that the language of Mr. Justice Holmes can be applied with particular fitness to Richardson in the present case.

Certainly, if any degree of self-protection was reasonably to be expected of any employes at the scene of Richardson's injury, Richardson himself could fairly be expected not to turn and expose his eyes to the flying chips. Certainly, in the words of Mr. Justice Holmes, "the railroad company was entitled to expect that self-protection from its employees."

It seems plain that had the Circuit Court of Appeals not eliminated from the scope of assumed risk the negligence of Richardson's fellow-employees, that Court would have had to hold, as a matter of law, that Richardson did assume the risk of injury so as to bar his recovery. We believe, as we have argued above, that the evidence does not show any negligence on the part of the cutting crew, but allowing Richardson all he can claim on this point, his recovery must still have been defeated had the lower court followed the law of *C. & O. Ry. Co. v. Nixon.*

The Court of Appeals' definition of assumption of risk was erroneous also in asserting that it

> "rests upon the intelligent acquiescence and knowledge of the danger and appreciation of the risk * * *."

This Court has on numerous occasions held that the assumed risks include not only those of which the employee has actual knowledge and to which he intelligently acquiesces, but also those risks which are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them. Thus in the case of

> *C. & O. Ry. Co. v. DeAtley,* 241 U. S. 310, 36 S. Ct. 564, 60 L. Ed. 1016 (1916)

this Court reversed a judgment recovered by a brakeman who was injured while attempting to board a moving train, on the theory that he could not recover if the undue speed of the train was so obvious that an ordinarily careful person in his situation would observe the speed and appreciate the danger. A paragraph from the opinion of the Court, delivered by Mr. Justice Pitney, summarizes the application of the rule in that case (241 U. S., at p. 314):

> "On the facts of the case before us, therefore, plaintiff having voluntarily entered into an employment that required him on proper occasion to board a moving train, he assumed the risk of injury normally incident to that operation, other than such as might arise from the failure of the locomotive engineer to operate the train with due care to maintain a moderate rate of speed in order to enable plaintiff to board it without undue peril to himself. But plaintiff had the right to presume that the engineer would exercise reasonable care for his safety, and cannot be held to have assumed the risk attributable to the operation of the train at an unusually high and dangerous rate of speed, until made aware of the danger, unless the speed and the consequent danger were so obvious that an ordinarily careful person in his situation would have observed the one and appreciated the other." (Citing cases.)

Considering the present case in the light most favorable to Richardson, it seems to us that it is squarely within the rule of the *DeAtley* case. Richardson, let us admit, had the right to presume that the cutting would not be commenced and the chips would not begin to fly until he had reached a distance of 30 feet or 40 feet, or whatever other number of feet anyone could regard as a safe distance. Let us also admit that the cutting crew was negligent in beginning their work when he was only 8 to 20 feet away. Let us also admit that there was substantial danger of injury to other parts of Richardson's body than his eyes, at a distance of 18 to 20 feet. With all of these admissions made, whether justifiably or not, the fact remains that the danger to the eyes, in facing the operation without goggles, was

so obvious that no ordinarily careful person in Richardson's situation could have failed to observe and appreciate it.

DeAtley, as this Court said, assumed the risk of boarding trains moving at slow speeds, but not the risk of the engineer negligently operating the train too fast to be safely boarded, unless the danger arising therefrom was obvious to the specified degree. Richardson presumably assumed certain risks of his employment, but not the risk of the cutting crew starting too soon, *unless the danger therefrom was obvious to a similar degree.* It was this last clause that the Circuit Court of Appeals missed. That court held that Richardson would not in any event assume the risk of the cutting crew starting too soon. But the present record supports no other possible conclusion that the danger to the eyes from facing the work was so obvious and well known that no reasonable person could have failed to recognize it. Richardson's turning to face it was precisely analogous to DeAtley's attempting to board the moving train, with this exception: The speed of the train in DeAtley's case was such that this Court thought reasonable men might differ as to the obviousness of the danger therefrom, while in the present case, no reasonable difference of opinion could exist as to the danger of facing the cutting operation with unguarded eyes.

III.

OTHER ERRORS INTENDED TO BE URGED.

Included in the questions presented on the present record are the questions whether the trial court's charge was erroneous, and whether plaintiff's counsel was guilty of misconduct preventing a fair trial. We believe that these questions are substantial and ought to be considered by this Court if certiorari is granted, and we have included them in the petition for that reason. However, we do not claim that they present reasons for allowance of the writ of certiorari, and therefore they are not argued in this brief.

CONCLUSION.

The decision of the Circuit Court of Appeals in this case, if allowed to stand, will lead to confusion in the law applicable to Federal Employees' Liability Act cases in two respects in which it has heretofore been well and clearly settled,—namely, on the propositions, first, that an employee's negligence, where it is not extenuated or is in violation of a rule or specific instruction, defeats his recovery under the act, and second, that the employee assumes the risk of negligence of his fellow-servants not only where the danger therefrom is actually observed and appreciated, but also where it is so obvious that a reasonably careful person could not fail to observe and appreciate it. The points at which the lower court departed from the established law are quite easily observable on this record, as we have pointed out.

We submit that the writ of certiorari ought to be granted, and the law of the Sixth Circuit restored to conformity.

Respectfully submitted,

BEN B. WICKHAM,

Counsel for Petitioner.

(10)

APR 19 1941
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 930.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
A Corporation,
Petitioner,

vs.

ELMER RICHARDSON,
Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for a Writ of Certiorari.

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In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 930.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
A Corporation,
Petitioner,

vs.

ELMER RICHARDSON,
Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for a Writ of Certiorari.

ADDITIONAL STATEMENT OF FACTS.

At the outset of this brief we desire to clarify somewhat the Statement of Facts contained in the Petitioner's Summary Statement.

This can be done most easily by quoting directly from the Opinion of Judge Hamilton:

> "Appellee had been employed by the appellant for nine years and at the time of the accident had been a member of a track repair and service crew since 1928 which operated under the supervision of a foreman. On the morning of the accident, he was pulling spikes when the foreman directed him to assist two other men who were cutting a steel rail with a chisel. The rail had been cut originally with an acetylene torch but had cracked and split, and, on explicit directions from the supervisor, the defective end was being chiseled off by a cutting crew consisting of three men, two alternating in swinging sledges and one holding the chisel. After one side was cut, appellee was directed by the foreman to turn the rail so the upper part or ball would be exposed and adjust it 'workwise' on the angle bar for the cutters, which he did and after this adjustment,

started to walk to a safe distance when he heard the sledges strike and startled, turned half way around and a sliver of steel struck him in the right eye, totally destroying the sight. The foreman had given instructions to the men cutting that they should at all times give the man turning the rail sufficient time to get in the clear and the employees who did the adjusting were instructed to get far enough away to be in the clear.

"There is substantial evidence in the record that it was unsafe to have the face turned toward the chiseling within thirty feet without goggles and that appellee requested the cutters to wait until he got in the clear before striking the chisel."

It is obvious, both from the Summary Statement in the Petitioner's brief and from the foregoing quotation from the Opinion in the Circuit Court of Appeals, that the question involved in this case is essentially factual.

There is ample evidence to show that the foreman had issued explicit instructions both to the plaintiff to get in the clear (inasmuch as he had no goggles) *and* to the other men not to begin pounding or cutting until the plaintiff was in the clear.

"Q. Were the men engaged in the cutting operation in this particular case, the Higginbotham boys and Winston Bailey, under instructions not to start cutting until those who were about and did not have goggles had an opportunity to get in the clear?

A. Well, the instructions—they had been instructed by me—I asked them not to cut the rails until the men got in the clear.

Q. * * * were the cutters told not to start cutting until men like Richardson, whose duties required them to turn the rail or adjust it into place, were given an opportunity to get in the clear?

A. They was told by me, as the foreman, to give them men plenty of time to get away." (44, 45.)

This specific testimony from the foreman himself was corroborated by the testimony of one of the cutters, Deward Higginbotham:

"Q. Did these instructions then extend to him?
A. No, just the chisel man and the hammer men.
Q. You were to wait until the fourth man got out of the range of the chips?
A. Yes, sir.

* * * * *

Q. What were the instructions to the other three men?
A. To wait until the fourth man got out of the range of the chips." (46.)

And this again was corroborated by another witness, Ezra Higginbotham:

"Q. And your instructions were to wait until the turning man was in the clear before you started striking; is that right?
A. Yes, sir." (30.)

The plaintiff himself had received specific instructions (inasmuch as he had no goggles) that he was to get himself "in the clear" before the cutting started.

"Q. Had you ever received any instructions from Walter Williams, the foreman, as to what you were to do while rail-cutting was going on, if you didn't have goggles?
A. Yes, sir.
Q. What were those instructions?
A. To get back in the clear.
Q. And did those instructions indicate how far you were to go to regard yourself in the clear?
A. Well, I took it about 35 or 40 feet.

* * * * *

Q. You have just given us a moment ago the estimate of 35 or 40 feet. Was that your estimate of what was in the clear, or what was told to you by Williams?

A. That was my estimate of what was in the clear.

Q. * * * did Williams tell you that also, or did he tell you something different from that?

A. He told me that also." (20.)

While the plaintiff was trying to get "in the clear" in conformity with the express instructions of his foreman, both to himself *and* to the cutters, the cutting started when he had taken only a few steps. He turned to remonstrate and as he was in the act of turning, was hit in the eye with a chip of steel.

"Q. How far do you think you had walked from the end of the rail where the cutting was going on before anything happened?

A. Around 18 or 20 feet, in that neighborhood.

Q. And then what, if anything, attracted your attention and what did you do?

A. I heard them start pounding.

Q. Then what did you do?

A. I started to turn around to see what they were doing, and it smacked me in the eye.

Q. And what smacked you in the eye?

A. The steel chip off of the rail." (18, 19.)

Not only had the foreman instructed the plaintiff to get in the clear before the cutting started—and given further instructions to the cutters themselves to wait until he was in the clear before starting—but the plaintiff himself had told them to wait.

"Q. When you stood there with them, and as you were about to walk away, was anything said by you to them or by them to you?

A. Yes, sir.

Q. And what was said?

A. I told them to wait till I got in the clear.

Q. What, if anything, did they say to you, or any of them say to you?

A. One of them said 'All right.'" (19.)

When the cutting began the plaintiff started to turn around to remonstrate.

"Q. Now, you said you started to turn around to see what they were doing. You knew what they were doing?

A. I say I started to turn around to tell them to wait till I got in the clear. I had that in my mind. I didn't tell them anything.

* * * * *

Q. You started to turn around to see what they were doing, and with the intention of telling them to stop?

A. That is right." (23, 24.)

QUESTIONS PRESENTED.

In support of this Petition for Certiorari the Petitioner makes two points:

(1) Was Richardson's act in turning to face the cutting operation the sole, proximate cause of the injury?

(2) Did Richardson assume the risk as a matter of law?

I. WAS RICHARDSON'S ACT IN TURNING TO FACE THE CUTTING OPERATION THE SOLE, PROXIMATE CAUSE OF THE INJURY?

The Petitioner argues that there was no evidence of negligence on the part of the Railway Company.

This seems to us too absurd for serious argument.

Without dispute, the foreman instructed the cutters *not* to begin cutting until Richardson was *"in the clear"*; and that distance was estimated by the foreman at thirty-five to forty feet.

This instruction was fortified by an additional request from Richardson himself.

Despite this instruction, and despite this request, the cutting operation was started before Richardson had gone half way.

We submit that this violation of a specific instruction was, to say the least, some evidence of negligence.

It is argued, however, by the Petitioner, that Richardson himself was guilty of such negligence as to defeat recovery under the rule of *Railway v. Wiles*, 240 U. S. 440.

This case has no relationship whatever to the facts at bar. Wiles was a freight brakeman who neglected his duty to place warning signals so as to protect his train from an approaching train. His negligence was not debatable; nor was it possible to argue that his own death was not produced directly and proximately by his own violation of a clear, specific and mandatory rule.

In our case at bar we have, on the contrary, clear negligence on the part of the Railway Company in the failure of the cutters to comply with orders of their superior.

Even if Richardson were negligent, it would still be a case for the application of the doctrine of comparative negligence, and certainly could not in any situation foreclose his right of recovery as a matter of law.

It will be kept in mind that counsel for the Railway Company did not request any instruction on the doctrine of contributory negligence, or, more accurately, of comparative negligence. Counsel insisted at all times that they were entitled to a directed verdict.

On the issue of negligence, therefore, it was only necessary for us to show that there was substantial evidence of Petitioner's negligence. Once that was shown (and unless the doctrine of assumption of risk prevented), Richardson was clearly entitled to go to the jury.

II. DID RICHARDSON ASSUME THE RISK?

It is the claim of Petitioner that Richardson assumed the risk of the injuries which he suffered, and therefore can not recover.

In support of this claim it has cited a number of cases which (it seems to us) have no relevancy whatever.

In the case of *C. & O. Ry. v. Kuhn*, 284 U. S. 44, for example, the plaintiff was also hit by a chip of steel.

On the face of it, therefore, the decision in that case—that the injured man had assumed the risk—might be thought to be applicable to our case at bar.

Upon examination, however, it is obvious that the facts are utterly dissimilar.

In the *Kuhn* case, the plaintiff was injured as he *stood* by the cutters—knowing that chips were likely to fly—and that he was likely to be injured.

But in our case at bar Richardson did *not* stand by. *He* was on his way to get "in the clear." He had specifically asked the cutters to wait; and they had been instructed by their foreman to wait.

How can one read *voluntary assumption of risk* into that sort of conduct?

The best proof of the unsoundness of Petitioner's claim is to be found in an inquiry as to *when* the risk was assumed.

Certainly it was not assumed by the act of asking the men to wait till he was in the clear.

Certainly it was not assumed by the act of starting to walk away.

It follows, therefore, that if there was any assumption of risk, the Petitioner is driven to the claim that it was in the act of pausing to turn while in the act of walking away.

Surely it is a strange modification of the old doctrine of assumption of risk to argue that a single act of this character is enough to disqualify Richardson from all rights of action.

If anything—it was a single act of contributory negligence; and not a voluntary acknowledgment of and acceptance of risks and hazards that were necessary and inherent in the situation.

But the real fact of the matter is that when Richardson paused and turned, he turned to *remonstrate* with the cutters for starting too quickly.

"Q. Then as you walked, you say you got about 18 or 20 feet away * * * you heard * * * them start pounding * * *?

A. Yes, sir.

Q. Did you say anything to them as you turned?

A. I didn't but I had intentions to say.

Q. Had intentions to do what?

A. I had intentions to tell them to wait till I got farther away.

Q. How far had you turned when, as you express it, the steel struck you in the eye?

A. About half way around." (19.)

* * * * *

"Q. Now, you said you started to turn around to see what they were doing. You knew what they were doing?

A. I say *I started to turn around to tell them to wait till I got in the clear.* I had that in my mind. I didn't tell them anything.

* * * * *

Q. You started to turn around to see what they were doing, and *with the intention of telling them to stop?*

A. That is right." (23, 24.)

Counsel assume (without warrant, we submit) that turning to remonstrate was not only negligence, but that there would have been no chance of danger or harm if he had not turned. This would seem to be inconsistent with the evidence.

"Q. Now the danger from those chips was that they might strike you in the face?

A. Certainly.

Q. If they struck you in the body, in the back, they wouldn't do you any particular harm?

A. Yes, I think so.

Q. They would sting you?

A. Yes, sir.

Q. They wouldn't produce any serious injuries?

A. At the speed that there one was going to do me that damage, if it hit me in the back of my head." (21.)

The general rule as it relates to the doctrine of assumption of risk is stated in *Roberts on Federal Liabilities of Carriers*, 2 ed., Vol. 2, Section 831, as follows:

> "§ 831. *Ordinary risks and known or obvious extraordinary risks assumed by interstate employees.* The nature and elements of the doctrine of assumption of risk, as applied to interstate employees of interstate carriers under the federal act, having been well established in a series of controlling decisions by the United States Supreme Court. The risks are of two kinds, ordinary and extraordinary. Ordinary risks are those that are normally incident to the occupation in which an employee voluntarily engages. An employee is conclusively presumed to have knowledge of such risks and assumes injuries arising therefrom. Such ordinary risks are assumed by an employee whether he is actually aware of them or not; for the dangers and risks that are normally or necessarily incident to his occupation are presumably taken into account in fixing the rate of wages. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the carrier to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These are known as extraordinary risks. An employee has the right to assume that his employer has exercised due care for his safety. He is not to be treated as assuming these extraordinary risks arising from defects due to the negligence of the employer unless he has knowledge of them and the danger arising therefrom, or unless the risk and danger are so obvious that an ordinarily prudent person under similar circumstances would have known the risk and appreciated the danger arising therefrom."

Furthermore, as pointed out by the same authority, ordinarily there is no assumption of the negligence of a fellow servant (§ 833, page 1619):

> "* * * Under the federal act, an employee has the right to presume that the employer has exercised reasonable care for his safety, and this presumption ap-

plies to the acts of a fellow servant. He does not ordinarily assume the negligent act of a fellow servant; but if he becomes aware of the risk and danger arising therefrom and continues in the employment, or if the risk and danger arising therefrom are so obvious that an ordinarily prudent person under the same circumstances would have observed the one and appreciated the other, then an employee assumes the risk arising from the negligent act of a coemployee under the national statute."

Under the rule, as above stated, it would seem quite clear that there was no assumption of risk in the case at bar.

This very question was considered by the Trial Court, and the following observations were made by Judge Jones in overruling a motion for a directed verdict:

"Mr. Wickham: I would like to make a motion that the Court arrest the testimony from the jury and direct the jury to return a verdict for the defendant, on the ground that the plaintiff's own testimony shows that he knew and appreciated the risk and assumed it.

"The Court: Well, but under his testimony he states he requested the cutters to wait until he had gotten into the clear and they failed to do so. * * * That would show an appreciation of the danger and for that reason a desire to get into the clear.

* * * * *

"Mr. Wickham: * * * supposing we say that is some evidence of negligence in disregarding his request, then I say that being some evidence of negligence, the doctrine of assumed risk is clearly applicable because he, an experienced employe * * * knowing the likelihood of the flying of chips, and knowing that he could or could not, as he chose and as he voluntarily acted, expose himself or keep himself protected from those chips, he took the alternative of turning toward the work he knew was going on, so assumed the risk. The assumption of risk applies not only to those risks which are ordinarily the hazards of an industrial occupation but those risks which are caused by the negli-

gence of the employer himself, if you please, if the employe knows of the existence of that want of care of the employer and voluntarily exposes himself to that very danger. Now, he did that exactly.

"The Court: I agree with you he waives the rule if the evidence shows on all other occasions the cutters had stopped (probably a misprint for started) before the man got in the clear * * *. Suppose it struck him in the back of the neck; he wouldn't have turned? Do you say he would have assumed the risk of injury?

"Mr. Wickham: I say he would have suffered no severe injury.

"The Court: The question has nothing to do with the extent of the injury * * * I do not think the question of turning enters into the question of assumption of risk. I think the doctrine of assumption of risk is whether he assumed the risk of the cutters starting before he reached a safe distance. If he knew the cutters were in the habit of starting to cut before he and men engaged in like service were what they call 'in the clear,' well, I agree with you there might be a question of the assumption of risk." (30-32.)

There was not one syllable of evidence in the record to show that the cutters were in the habit of beginning before the Respondent or men without goggles had gotten in the clear; and there was, therefore, we submit, no basis for the claim that he had conclusively assumed the risks of such conduct on their part.

As stated by *Roberts* in the treatise above referred to, Vol. 2, page 1636:

> "Knowledge of the risk is the watchword of the defense of assumption of risk."

If this be true, then how can it be seriously claimed that Richardson had knowledge of the risk that the cutters would violate the instructions of their own foreman, and would further fail to heed the request and warning given by Richardson himself?

If there was anything whatever that Richardson did that he ought not to have done, it was clearly a matter of contributory negligence; and *not* any question of assuming a risk of which he had knowledge.

One of the leading cases is *C. & O. Ry. v. De Atley*, 241 U. S. 310, 60 L. Ed. 1016.

In this case the plaintiff, a brakeman, was injured while attempting to mount a freight engine while the train was in motion.

His employment required him to mount such moving trains frequently, and this could be done with reasonable safety if the train was moving at a moderate rate of speed.

In this particular case, however, the train was moving somewhat more rapidly than usual, and it was the brakeman's claim that his injuries were due to this excessive speed.

One of the problems was whether or not this was a hazard or risk which the plaintiff had assumed.

The Supreme Court of the United States, speaking through Mr. Justice Pitney, held that the ordinary risk of mounting a moving engine was one which was known to him and was, therefore, assumed by him; but the increased risk due to the greater speed of the train was not one that was assumed by him. It was held, on the contrary, that the plaintiff, who was not shown to have known or appreciated the increased risk of the greater speed, could not, as a matter of law, be said to have assumed this increased hazard, and that although the extraordinary risk which the plaintiff encountered was exactly the same kind of a hazard as the one which he ordinarily assumed, it was in fact sufficiently greater in degree that the doctrine of assumption of risk would not conclusively dispose of his claim.

The following rule was laid down by Mr. Justice Pitney:

> "* * * According to our decisions the settled rule is not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them."

Counsel have not cited, and doubtless were unable to find any case where it has been held that an injured railroad employee assumed the risk in a situation at all similar or analogous to the facts of the case at bar.

In the case of *R. R. Co. v. Horton,* 233 U. S. 492, the facts involved a guard glass which was entirely absent, and the plaintiff, with full knowledge of the absence of this guard, continued to use the water gauge, and was, of course, held to have assumed the risk of such a condition.

We submit that has no application or relevancy to the facts of the case at bar.

Obviously, Richardson in the case at bar, if he had stood beside the cutters without complaint and without any attempt to get into the clear, would have assumed the risk of flying particles.

But that is precisely what he did *not* do. On the contrary, he *sought to escape the risk* by following out the instructions of the foreman.

We submit, therefore, that under the clear authority of the *De Atley* case, *supra,* and the well recognized principles of the doctrine of assumption of risk, there was here no such knowledge that the men would begin cutting as to cause the continuance in employment to establish conclusively an assumption of this risk on the part of Richardson.

IN CONCLUSION.

We submit that there is nothing whatever in this case that warrants or requires further review, and that our controversy is essentially one of fact, rather than with respect to the principles of law which ought to obtain.

We submit, therefore, that no adequate reason has been shown why there should be a further review by this Honorable Court.

Respectfully submitted,

M. C. HARRISON,

Attorney for Respondent.

HARRISON & MARSHMAN,

Of Counsel.